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Nos. 06-713, 06-730

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SUPREME COURT, U.S.

In The Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; DIANE TEBELIOUS; BERTABELLE HUBKA; STEVE NEIGHBORS; MIKE GASTON; MARCY COLLINS; MICHAEL YOUNG; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDY; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; and J.S. MILLS

STATE OF WASHINGTON; ROB McKENNA, Attorney General; and SAM REED, Secretary of State,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; DIANE TEBELIOUS; BERTABELLE HUBKA; STEVE NEIGHBORS; MIKE GASTON; MARCY COLLINS; MICHAEL YOUNG; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDY; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; and J.S. MILLS

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF LOUISIANA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is the Louisiana "Open Primary" system significantly different from Initiative 872 passed by the State of Washington such that it can avoid any negative effect from the ruling of the Court on the instant issue?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST IN AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

California Democratic Party v. Jones, 530 U.S. 567, 120 S. Ct. 2402 (U.S. 2000) 4

Dow Hydrocarbons & Resources v. Kennedy, 694 So. 2d 215 (La. 1997) 6

Love v. Foster, 147 F. 3d 383 (5th Cir. 1998) 4, 5, 7

Love v. Foster, 90 F. 3d 1026 (5th Cir. 1996), *affirmed*, *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464, 139 L.Ed.2d 369 (1997) 5

Pershall v. State, 697 So. 2d 240 (La. 1997) 6

State v. Johnson, 343 So. 2d 705 (La. 1977) 6

STATUTES

Act 560 (2006 Regular Session of the Louisiana Legislature) 7

INTEREST IN AMICI CURIAE

In view of the fact that the State of Washington has passed an open primary election system similar to the Louisiana system, the State of Louisiana believes it has an interest in this ruling by the Supreme Court. Louisiana's open primary system has been referenced by the Ninth Circuit in its opinion declaring the state of Washington's open primary system unconstitutional. The Amicus brief will highlight the fact that Louisiana's primary election system differs from the one passed by Washington, and therefore, should not be affected by the outcome of the instant matter.

SUMMARY OF ARGUMENT

In November 2004, the voters in the state of Washington overwhelmingly passed a new open primary election system. This system allows all candidates, regardless of political party affiliation, to have their names placed on the primary ballot for a particular elective office. The voters, regardless of political affiliation, are able to cast a vote for any of the candidates in that race. The top-two finishers, regardless of percentage of votes obtained, advance to a general election. This system has been found to be unconstitutional by both the United States District Court and the United States Court of Appeals for the Ninth Circuit. The Supreme Court of the United States granted the writ application filed by the state of Washington.

While Louisiana's Open Primary was referenced during the course of this litigation as similar to the Washington Primary System, it is distinguishable from Washington's and should not be affected by any ruling by the Supreme Court in this matter.

ARGUMENT

In January 2004, the Washington State Grange (hereinafter referred to as "Grange")[1] filed Initiative 872 (hereinafter referred to as "I-872") with the Washington Secretary of State. The initiative made several changes to the primary election system but it retained the partisan nature of the primary. The language of the initiative stated that it "concerns elections for partisan offices" and "would change the system used for conducting primaries and general elections for partisan offices." I-872 was to be placed on the November 2004 general election ballot to be voted on by the people.

Significant of note, I-872 would retain a general election for the top two finishers regardless of the percentage of votes a candidate received. The Louisiana system, on the other hand, provides for a winner to be declared in the "primary" should one candidate receive 50.1% of the vote, thereby negating the need for a general election.

In March 2004, the Washington legislature adopted two alternative primary systems, subject to the outcome of the vote on I-872 in the November 2004 general election. As its first choice, the legislature adopted a "top two" primary system similar, though not identical, to the one the Grange proposed in I-872. The United States Court of Appeals for the Ninth Circuit noted in its ruling that this "top-two" primary is also sometimes referred to as the

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[1] The Washington State Grange is a subsidiary of the National Grange, which is described by its Washington chapter as "America's oldest farm-based fraternal organization" and as "a non-partisan, grassroots advocacy group for rural citizens with both legislative programs and community activities."

"Cajun" or "Louisiana" primary, after the only other state that employs a similar sort of primary.

Washington Governor Locke vetoed the "top two" primary system in April 2004, so the legislature instead, enacted the so-called "Montana" primary, which is similar to an open-primary. This system, according to the Ninth Circuit, allows a voter to vote for a party's nominee but the voter's choice is limited to that party's nominee for all offices. If the voter chooses the Democratic nominee for governor, then he must choose the Democratic nominee for all offices on that ballot.

Despite the actions of the legislature, the voters of the State of Washington overwhelmingly passed Initiative 872 in November 2004, which was to become the new state's partisan primary election system. This new system allows all voters to vote for any candidate, and the top two candidates advance to the general election regardless of party affiliation.

The Washington State Republican Party and the Washington State Democratic Central Committee moved for a preliminary injunction to prevent the state from implementing I-872 just five months after it went into effect. The district court found that the implementation of I-872 would unconstitutionally impair the freedom of speech and associational rights of the plaintiffs.

The court reasoned that allowing a candidate to publicly state a party preference in a primary election creates a constitutionally significant "association" between the candidate and the party, an "association" which states may not foster without political party consent.

The State and the Grange appealed the ruling to the Ninth Circuit.

The Ninth Circuit affirmed the trial court by holding that the initiative redefined the concept of "partisan office," but those offices remain partisan and so does the primary. By including candidates' self-identified political party preferences on the primary ballot, Washington permits all votes to elect individuals who may effectively become the parties standard bearers in the general election.

In 1976, the Louisiana Legislature completely rewrote the state's election code. That revision abolished the state's dual primary system in favor of an open primary system where all qualified candidates regardless of party affiliation appear on the same ballot, and all voters, regardless of party affiliation, are entitled to vote.

In *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402 (U.S. 2000), Justice Stevens, in his dissent, noted that the Louisiana primary system "is not actually a 'primary' in the common, partisan sense of that term at all. Rather, it is a general election with a runoff . . . "

Louisiana's "primary" system for state elections is therefore distinguishable from the Washington "primary" system and should not be impacted by a ruling from the Supreme Court on the instant matter.

In *Love v. Foster*, 147 F. 3d 383 (5th Cir. 1998), the petitioners alleged that Louisiana's open primary system authorized a contested election for members of Congress to be decided before the uniform federal election day in November, thereby violating Federal law.

The trial court granted summary judgment to the defendants and the plaintiffs appealed to the United

States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed the trial court, holding that the Louisiana primary schedule violated federal law by deciding on members of Congress before the uniform federal election day.[2]

The Supreme Court grated *certiorari* and held that "when Louisiana's statute is applied to select from congressional candidates in October, it conflicts with federal law *and to that extent* is void."[3] The case was remanded with directions to reconsider the plaintiffs' request for injunctive relief if the Louisiana legislature did not timely resolve the violation caused by the October primary election of federal candidates.

When the legislature failed to take corrective action, the trial court ordered that future elections for members of Congress shall be held on the federal election day and any necessary run-off would be held on the next available election day contained in the Election Code.

The plaintiffs appealed the order contending that the trial court erred when it failed to reinstate the prior closed primary system in effect before the Election Code revisions in 1975. They allege that by striking down the provisions for an October election for congressional offices, the Supreme Court vitiated the entire election code, thereby revising the previous election system.

The Fifth Circuit began its opinion by emphatically stating, 147 F. 3d at 383, that,

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[2] *Love v. Foster*, 90 F. 3d 1026, 1031 (5th Cir. 1996), *affirmed*, *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464, 139 L.Ed.2d 369 (1997).

[3] *Id.* 522 U.S. at ___, 118 S.Ct. at 468, 139 L.Ed.2d at 376.

> There has been no relevant finding that the remainder of Louisiana's election code is in conflict with the Constitution or with any federal statute. In our earlier rejection of the invitation to declare the current election system invalid, and to replace it with the previous scheme, we stated that such a "drastic remedy would require us to radically overhaul the state's election procedure and reinstate an election system which the state abolished eighteen years ago." We were not then prepared to take that Gargantuan step, nor, apparently, was the Supreme Court. We are not now prepared to do so unless mandated by dispositive law.

The Court noted that the critical question at hand was whether the invalidity of the provisions for the October primary to elect members of Congress doomed the entirety of the Louisiana election code. The Court had to decide if that section was severable from the legislation.

It was determined by the Court that the Legislature would have adopted that Election Code without the invalid provisions, so the Court then focused on whether the remainder of the Election Code was capable of enforcement without the provision. Citing *Dow Hydrocarbons & Resources v. Kennedy*, 694 So. 2d 215, 218 n. 7 (La. 1997), the Court held that "it is not within the authority of the judiciary to rewrite the legislation in order to salvage the remainder." For the legislation to survive, the valid portions of the election code must form a complete act within itself.[4]

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[4] *Pershall v. State*, 697 So. 2d 240 (La. 1997); *State v. Johnson*, 343 So. 2d 705 (La. 1977).

The Fifth Circuit held, 147 F. 3d at 386, that:

> The Louisiana election code systematically is complete. It provides for an open primary for election of state and federal office holders. It establishes detailed procedures for implementing elections and regulating the voting process. It provides an encompassing body of law governing the conduct of local, state and federal elections. Examining the Louisiana election code without the October, formerly September, first primary date, we find adequate and sufficient election series to accomplish the true purpose of the election code – the proper and appropriate election of the candidates favored by the majority of the voting electorate.

The Court concluded by ruling that the invalidated October first primary date is severable, and that the election statutes, after the severing of the October primary election, remain complete, sufficient, enforceable, and stand on their own.

The Louisiana Legislature did enact legislation to resolve the conflict articulated in *Love* when it passed Act 560 in the 2006 Regular Session. This legislation established closed primaries for federal elections and provided for appropriate election dates to fall on the uniform federal election day commencing with the federal elections in 2008.

CONCLUSION

For the foregoing outlined reasons, the current Louisiana primary election system should be viewed as unique from the system implemented by the State of Washington and any ruling regarding the instant matter should not have any effect on the Louisiana primary system.

Respectfully submitted,

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